



Termination of Employment: Including Unfair Dismissal

There are many different ways that your employment may end, and each way has different legal requirements and implications.

Dismissal

If you are a permanent employee and you are dismissed (other than for serious misconduct), your employer must give you the period of notice (in writing) required by your award, registered agreement (that is, an agreement that has been registered and approved by the relevant tribunal or government authority, such as an enterprise agreement, workplace agreement or pre-reform agreement) or contract, or pay you the equivalent in lieu of notice. Employees on probation are still entitled to notice. If you are sacked without notice or pay in lieu of notice (and it was not a case of gross misconduct), you can make an application to the Fair Work Ombudsman to claim this payment within 6 years. If there is no award or agreement fixing minimum periods of notice, then the following periods apply by law:

| Period of continuous service | Notice required* |
|------------------------------|------------------|
| Up to 1 year | 1 week |
| 1 to 3 years | 2 weeks |
| 3 to 5 years | 3 weeks |
| Over 5 years | 4 weeks |

**An additional week is added if the employee is more than 45 years old and has more than two years of continuous service with the employer.*

Resigning

Your relevant modern award, registered agreement or employment contract should state how much notice, if any, employees are required to give when they resign. If there is no award or agreement fixing minimum periods of notice, then the above periods apply.

Employees should also be aware that some modern awards, registered agreements and employment contracts provide that an employer can withhold money from an employee if they do not give the required amount of notice. If you are a casual employee, you are usually not obliged to give any notice, although you should check your modern award, agreement or employment contract to confirm this as some may require notice for casual employees.

Sometimes people feel forced to resign. This may be for various reasons, such as an unsafe workplace, or being subjected to ongoing workplace bullying or

discrimination. These cases may be considered 'constructive dismissal' – see below for more details.

Constructive dismissals

The *Fair Work Act 2009* (Cth) (the '*FW Act*') provides that an employee will be taken to have been 'dismissed' by the employer if they resign because of particular conduct or a particular course of conduct engaged in by the employer. This is relevant if you are making a claim for unfair or unlawful termination where you must be able to show that your employment was effectively terminated 'at the initiative of the employer', because the employer's conduct led to a situation where you felt compelled to resign. In some cases an employer may not say 'you're sacked', but may still force you to leave because of the things they say, do or fail to do. Or they may expressly direct you to resign or otherwise you will be sacked. This is a complex area and it is important that you get further advice about the prospects of success of a constructive dismissal claim before you leave your employment.

Instant or 'summary' dismissals

If you are dismissed for serious misconduct you are not entitled to any notice of termination, or pay in lieu of notice. The *FW Act* describes serious misconduct as including such things as theft, fraud, committing an assault, being intoxicated at work, behaving in a way that causes serious and imminent risk to the health and safety of a person or to the reputation or viability of the business, or refusing to carry out a lawful and reasonable instruction. Your modern award, registered agreement, employment contract or employer policies may also include definitions of serious misconduct. If you are dismissed for serious misconduct you may lose your entitlement to pro-rata long service leave.

Completion of a fixed-term contract

A fixed-term contract is a contract of employment that is 'fixed' for a certain period or for a particular task or project. Generally, a fixed-term contract cannot be terminated before the end of the fixed-term period unless there is a specific provision for this in the contract (such as a termination provision, though it is best to seek advice on how this can be used). If a fixed-term contract does not contain a term providing for termination before the end of the term, it can only be terminated:

- if one party has breached an essential term, or
- by allowing the fixed term to expire.

If an employer wants to end a fixed-term contract early, they may have to pay out the balance of the contract.

Demotion or major change made by the employer

If you are demoted or your conditions of employment change significantly, and you did not agree for this to happen and the new position involves a significant reduction in either remuneration or duties, then it may be considered that you have been dismissed by the employer. However, there are situations where a demotion may not be classified as a dismissal, so seek advice if you are uncertain of the

status of your demotion.

Redundancy

If you lose your job because the job itself is no longer required at your workplace, according to the law you are considered to be redundant. This may happen due to changing operational requirements, the introduction of new technology, economic downturns, company mergers, take-overs or restructuring. Before making you redundant, the employer should follow any consultation requirements in your award, agreement or employment contract. Your employer may also be required, if possible and reasonable, to redeploy you to another position with the employer or a related company. If the redundancy is not a genuine redundancy, you may be able to claim unfair dismissal (see below).

In addition to the employer providing the relevant notice of termination, or pay in lieu of notice (see below), you may also be entitled to severance pay. This is to compensate you for the loss of benefits (such as accrued long service leave) and for the inconvenience and hardship caused by the loss of employment. You should check your award, agreement or employment contract for a clause on redundancy payments, including restrictions on when those payments apply. For those not covered by any such clause, there is an entitlement to redundancy pay under the National Employment Standards (NES). The NES can be found in the *FW Act*. This entitlement will generally apply to employees who have been employed for at least one year, unless their employer has 15 or less employees, or the employee is an exempted category.

However, unless an employee had an entitlement to redundancy pay under an award, agreement or contract of employment as at 31 December 2009, only their service with their employer from 1 January 2010 is counted towards your NES redundancy entitlement.

If your employer has 15 or less employees you do not have an entitlement to redundancy pay (severance) under the NES. You may not be entitled to redundancy pay if you are moving from one employer to another in a transfer of business situation (for example, your employer's business has been bought by another business and you are going to work for the purchasing business); and generally, casuals, employees on fixed-term contracts and employees on training contracts are not entitled to redundancy pay. The entitlements under the NES (your award or agreement may be different) are as follows:

| Period of continuous service | Redundancy Entitlement (severance pay) |
|---|--|
| at least 1 year but less than 2 years | 4 weeks |
| at least 2 years but less than 3 years | 6 weeks |
| at least 3 years but less than 4 years | 7 weeks |
| at least 4 years but less than 5 years | 8 weeks |
| at least 5 years but less than 6 years | 10 weeks |
| at least 6 years but less than 7 years | 11 weeks |
| at least 7 years but less than 8 years | 13 weeks |
| at least 8 years but less than 9 years | 14 weeks |
| at least 9 years but less than 10 years | 16 weeks |
| over 10 years | 12 weeks* |

**Long service leave entitlements provide the rationale for reducing the redundancy pay entitlement for employees who have a period of 10 years continuous service or greater.*

If you believe that the redundancy is not genuine, for example if the position still exists, if you were not redeployed and reasonably could have been, or if the consultation requirements in your award or agreement have not been followed, you may be able to make a claim for unfair dismissal (see below).

Termination entitlements

If your employment is terminated, your employer must follow due process. You are entitled to:

- a valid reason for the dismissal,
- a fair and transparent process leading up to the dismissal,
- written notice of the date of termination (unless you are a casual),
- wages due at the time of dismissal,
- a separation certificate (if your employer refuses to provide one, contact Centrelink)
- payment for annual leave not taken,
- redundancy entitlements (if applicable)
- depending on how long you have worked with your employer, and depending on the circumstances of your termination, you may be entitled to payment for long service leave not taken or pro-rata long service leave (unless, in some cases, if you were dismissed for serious misconduct).

Check your award, agreement or contract for any further termination entitlement.

Warnings

The purpose of a warning is to advise you that your work performance or conduct is unsatisfactory, and to put you on notice that the performance or conduct needs to be improved. Warnings may be given verbally or in writing. There is no minimum requirement that an employer must provide 3 warnings before a dismissal can occur; however, under the *Fair Work Act* a dismissal may be considered unfair if you were not given a warning and the opportunity to improve your performance.

It is always best to request a copy of the written warning and take it away with you so that you can respond to it (preferably in writing). You do not have to sign a warning. In cases where you are under pressure to sign a warning and you disagree with it, you can write on the document: 'I disagree with the contents of this document', sign it and then write a letter in response to the warning, objecting to the warning and explaining your concerns. Even though you may choose not to sign a warning that has been issued to you, it still has effect as a warning.

If your employer requests that you attend a meeting to discuss your work performance or conduct it is important that you attend the meeting. Under the *FW Act*, if you request to have a support person present and your employer unreasonably refuses your request, this may go towards your claim for unfair dismissal (see below).

Unfair dismissal

If you are a state government or local government employee you are not covered by the *Fair Work Act* and you come under the Queensland industrial relations jurisdiction where different provisions apply. Seek advice on the processes around unfair dismissal or visit: http://www.qirc.qld.gov.au/prod_form_leg/factsheets/index.htm.

For all other employees covered by the *FW Act* unfair dismissals are those that are 'harsh, unjust, or unreasonable' and include terminations by an employer where there is no valid reason or there has been no procedural fairness. If you believe you have been dismissed in a way that is harsh, unjust or unreasonable, you may be able to make a claim for unfair dismissal to the Fair Work Commission. It is possible to be reinstated or to receive compensation for the wages and other entitlements lost in the period between the dismissal and re-employment. The law on unfair dismissal is complex and it is wise to seek advice about your situation. If you decide to make a claim, don't delay. Applications must be lodged within **21 days** of your termination of employment.

Only employees can make a claim for unfair. This means that if you are engaged as an independent contractor or subcontractor then you cannot make a claim. However, in some circumstances workers who are called contractors are legally recognised to be employees. If you do not know what your employment status is, or you are unsure whether you are a genuine independent contractor or not, you should get advice as soon as possible.

Eligibility for making unfair dismissal application

Not every employee can make a claim for unfair dismissal. You are excluded from making a claim if any of the following applies to you:

- you have been working for your employer for less than 6 months, or, if your employer is a small business employer, less than 12 months (see the definition of a small business employer below);
- you are working for a small business employer (see the definition of small business employer below) who has complied with the Small Business Fair Dismissal Code. ***
- you are a casual employee (except where you have worked on a regular and systematic basis for the required amount of time as described above) and prior to the dismissal you had a reasonable expectation of continuing employment;
- you earn over \$123,300 per year and you are not covered by an award or agreement (this amount is indexed each year);
- you are employed under a fixed-term contract of employment or a training arrangement for a specified period of time (or season) or for a specified task and the contract, task, season or training period has ended;
- you are an independent contractor; or
- your dismissal was a genuine redundancy.

In deciding whether your dismissal was unfair, the Fair Work Commission will look at factors such as whether there was a valid reason for the dismissal related to your capacity or conduct, whether you were notified of that reason, whether you were given any opportunity to respond to the reason, whether your employer

unreasonably refused any request you made to have a support person present at any discussions relating to the dismissal, whether you had been warned about unsatisfactory performance before the dismissal (if this was the reason for the dismissal), and the size of the business and the absence of dedicated human resource management specialists.

What is a small business employer?

A small business employer is defined as having less than 15 employees, no matter how many hours they work. The headcount includes all full-time and part-time employees, casuals employed on a regular and systematic basis, employees of associated entities and the employee(s) being dismissed.

(*** You can find the Fair Dismissal Code at <http://www.fairwork.gov.au/Termination-of-employment/Documents/Small-Business-Fair-Dismissal-Code.pdf>). You should seek advice if you do not believe your small business employer has complied with the Code.

Unlawful dismissal (state system employees)

An unlawful dismissal or termination occurs if you are dismissed primarily for a discriminatory reason. If you are a state or local government employee you may be able to apply to the Fair Work Commission if the termination was based on these grounds.

Under the *FW Act* an employer must not end your employment because of:

- temporary absence due to illness or injury
- trade union membership or participation in trade union activities
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin
- seeking office or acting as an employee representative
- being absent from work during maternity leave or other parental leave
- temporary absence from work to engage in a voluntary emergency management activity or
- filing a complaint or participating in proceedings against an employer

Time limits (60 days) apply for making a claim of unlawful termination so get advice quickly. There is an application fee, which may be waived by the Commission if payment would cause serious hardship.

Unlawful dismissal (national system employee)

Under the *Fair Work Act* employees in the national system have rights in relation to freedom of association, discrimination and certain workplace rights. These are called the general protections provisions. Under these provisions employees are 'protected' from an employer taking any 'adverse action' that is prohibited under this Act in relation to these rights. This includes dismissal in certain circumstances, e.g. because they have a workplace right or have exercised such a right, or because of a characteristic such as sexual preference or race. See our info sheet on General Protections as well as Discrimination and Sexual Harassment.

Note : you cannot make a general protections dismissal application at the same time as an unfair dismissal application.

If you are eligible and decide to make a general protections dismissal application (adverse action dismissal) you must apply to the Fair Work Commission within 21 days of your dismissal taking effect. The Fair Work Commission may accept late applications in limited circumstances. A filing fee is payable. An application for the fee to be waived can be made if payment will cause serious financial hardship.

FOR MORE INFORMATION

Fair Work Infoline (For employees with wages, dismissal (i.e. notice periods and final pay – not unfair or unlawful dismissal) employment conditions and discrimination complaints)

Ph: 13 13 94

www.fairwork.gov.au.

Fair Work Commission (advice about dismissal, general protections information and application forms)

Ph: 1300 799 675

www.fwa.gov.au.

Queensland Council of Unions (for information about joining a union)

Ph: 07 3846 2468

www.qcu.asn.au.

Anti-Discrimination Commission Queensland

Ph: 1300 130 670

www.adcq.qld.gov.au.

Australian Human Rights Commission

Ph: 1300 656 419

www.ahrc.gov.au